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Railroad Corporation, 4 Selden, 175. There is no propriety, therefore, in saying that the defendants may be relieved from that liability by a want of such knowledge, when it has arisen from their gross neglect; for the neglect is gross, when the fact is, as is admitted by the demurrer, that *but for the want of all proper care and diligence, the unsafe condition of the engine would have been known to them*. We think, upon the facts admitted by the demurrer, the plaintiff can sustain this action, and that the declaration is sufficient.

The judgment of the county court must be reversed, and judgment rendered for the plaintiff.¹

In the District Court of Philadelphia.

LEECH vs. SHANTZ.

1. To render a transfer of personal property valid against creditors, it was formerly held that there must be an immediate, open and exclusive possession on the part of the transferee; but according to the more recent authorities the character of the sale may be investigated as a matter of fact, and its honesty and fairness determined by a jury.
2. *Dunlap vs. Bournonville*, 26 Penn. S. R. 72, and *McClure vs. Young*, 2 W. & S. 147, cited and relied upon.

The opinion of the court, in which the facts appear, was delivered by

STROUD, J.—From the time of *Clow vs. Woods*, 5 S. & R. 275, to *McVickar vs. May*, 3 Penn. S. R. 224; the first having been decided in 1819, the second in 1846—it was held again and again, that it was necessary, to render a transfer of personal property valid against creditors, that it should be attended with an immediate, open, and exclusive possession on the part of the transferee. See particularly, *Cunningham vs. Neville*, 10 S. & R. 201; *Babb vs. Clemson*, *ibid.* 419; *Streepe vs. Eckert*, 2 Whart. 302; *Carpenter vs. Mayer*, 5 Watts, 483; *Hoffner vs. Clark*, 5 Whart. 545; *McBride vs. McClelland*, 6 W. & S. 94. Indeed, a year after the decision of

¹ Consult 2 Selwyn's N. P., tit. "Master and Servant," 7th Am. Ed., Phila., 1857.

Mc Vickar vs. May, the old doctrine was re-asserted and re-affirmed in the fullest manner. *Cadbury vs. Nolen*, 5 Penn. S. R. 320.

But this doctrine no longer obtains. What was formerly a matter of law—to be determined by the court—is now regarded as a question of fact, in most cases, to be submitted to a jury. *Dunlap vs. Bournonville*, 26 Penn. S. R. 72, is the last reported case on the general subject. It presented on the trial a state of facts so clearly at variance with the policy of the law, not only as it was formerly held to be, but also as it was supposed it yet remained, that the president of the court before whom the cause was tried nonsuited the plaintiff, and his opinion was fully agreed to by the whole court on the motion to set aside the nonsuit. In the Supreme Court the judgment was reversed.

But in the opinion of the Supreme Court, in *Dunlap vs. Bournonville*, the judge who delivered it, says: “A mere formal or symbolical delivery will not avail, when an actual one is reasonably practicable, and such is its character where the real control is retained by the vendor, or immediately resumed by him.” And *McClure vs. Young*, 2 W. & S. 147, is referred to as rightly decided, and as furnishing an illustration of the distinction which still existed on this subject.

In *McClure vs. Young*, a yoke of oxen which had formerly belonged to Pettigrew were found in his possession, and seized by a constable (Young), under an execution against him. It was proved on the trial that Pettigrew brought the oxen to the place where McClure was, and there agreed to sell them to McClure for a sum of money, which he agreed to pay. About an hour after the purchase and delivery of the oxen to McClure, he agreed to let Pettigrew take and use them until he (McClure) should want them again. The Supreme Court held, that upon this evidence there was no question to be left to the jury, but the court was bound to consider it as a question of law, and that the transaction was to be regarded as a fraud per se.

The evidence in the case now before us seems to bring it within the principle of *Young vs. McClure*, as understood and explained in *Dunlap vs. Bournonville*. A mule, one of three, belonged to

Shaffer. Shaffer used them in drawing a boat on the Schuylkill canal. Leech obtained a judgment against Shaffer for \$127; issued an execution on which the sheriff seized on the three mules. The seizure of the mules was communicated to Shaffer, then in this city. He went to the Falls of Schuylkill, where Shantz resided, and agreed to sell one of the mules to him for \$100. Leech paid him the money, the mule being at the time in the custody of the sheriff at Reading. Shaffer having obtained the remainder of the money from some other source, gave the whole to his driver, who had come down to the Falls of Schuylkill, and he took it to Reading and settled with the sheriff, who thereupon gave up the mules to the driver. After the lapse of more than a week, the mules, drawing the boat, were brought down to the Falls of Schuylkill. Leech and Shaffer were there at the time. Shaffer took Leech to the stable where the mules were, and pointing out the mule which he had sold to Leech, said: "This is your mule." Leech took the mule and ran him out on the road, and immediately brought him back. He then said to Shaffer, "Can you do without the mule?" Shaffer said, "Not well." Leech replied, "Well, you can keep him, and pay me hire for it."

A few weeks afterwards, Shantz having obtained a judgment in this court, issued an execution, placed it in the hands of the sheriff, who thereupon seized the mule which had been sold to Leech. The usual course was then pursued by the sheriff, Leech having claimed the mule as his property, and an issue directed by the court, pursuant to the sheriff's interpleader act. The evidence above stated was given on the trial of this issue, when having heard the whole which the plaintiff offered, I directed a nonsuit. The application before us is to set aside this nonsuit on the authority of *Young vs. McClure*, which is distinctly recognized, as before stated, in *Dunlap vs. Bournonville*. We think the nonsuit was proper, and the motion of the plaintiff should be dismissed.

Motion dismissed.